7/8/13

RESOLUTION NO. 1294

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF EDMONDS, WASHINGTON, RELATING TO LAND USE AND ZONING, ADOPTING FINDINGS AND CONCLUSIONS TO REVERSE THE DECISION UPON RECONSIDERATION ENTERED BY THE EDMONDS HEARING EXAMINER CONDITIONALLY APPROVING THE HILLMAN CRITICAL AREAS REASONABLE USE VARIANCE, APPLICATIONS (PLN20120033) TO CONSTRUCT A SINGLE-FAMILY HOME LOCATED AT 1139 SIERRA PLACE, GRANTING THE APPEAL OF STEPHEN SCHROEDER, CHERYL BEIGHLE, TODD AND CANDY BROWN.

WHEREAS, on August 1, 2012, Tom and Lin Hillman submitted applications for a Street Setback Variance, Side Yard Setback Variance and a Critical Areas Reasonable Setback Variance in order to construct a single family home on property located at 1139 Sierra Place in Edmonds; and

WHEREAS, the City issued a Mitigated Determination of Non-Significance (MDNS) under the State Environmental Policy Act (SEPA) on February 26, 2013; and

WHEREAS, the SEPA MDNS was not appealed; and

WHEREAS, on March 14, 2013, the City Hearing Examiner conducted a public hearing on the applications; and

WHEREAS, on March 28, 2013, the City Hearing Examiner conditionally approved the variances; and

WHEREAS, the applicants Hillman and the City requested reconsideration of the Hearing Examiner's decision, and on April 16, 2013 the Examiner entered an Order on Reconsideration allowing all persons who submitted written or oral comment on the Hillman applications prior to the close of the public hearing to provide written responses to the

reconsideration requests and the Examiner's Order; and

WHEREAS, on April 24, 2013, the Hearing Examiner entered his Final Decision Upon Reconsideration, conditionally approving all of the variance applications; and

WHEREAS, on May 8, 2013, the Appellants Stephen Schroeder, Sheryl Beighle, Candy Brown and Todd Brown appealed the Examiner's Final Decision on Reconsideration;

WHEREAS, the City Council has the authority to hold a closed record appeal of the Hearing Examiner's decision under Edmonds Municipal Code Section 20.07.005; Now, Therefore,

THE CITY COUNCIL OF THE CITY OF EDMONDS, WASHINGTON, HEREBY RESOLVES AS FOLLOWS:

FINDINGS.

Section 1. Closed Record Public Hearing.

A. *Notice.* Notice of the Closed Record Public Hearing was provided as required by Edmonds Municipal Code Section 20.07.004(F).

B. *Hearing.* The closed record public hearing before the City Council was convened on June 18, 2013.

C. *Appearance of Fairness, Conflict of Interest and Ex Parte Communications.* At the outset of the closed record public hearing on June 18, 2013 and prior to voting on the draft Findings of Fact and Conclusions of Law on July 2, 2013, the decision makers were individually asked to disclose any appearance of fairness, conflict of interest and ex parte communications. Each Councilmember and the Mayor stated that he/she had none to disclose. The Mayor asked the members of the audience whether any one wished to challenge any decision maker's participation in the closed record hearing, and there was no reply.

D. *Exhibits.* Continuing the list of Exhibits in the Hearing Examiner's Final Decision on Reconsideration,[1] the following Exhibits were submitted:

Exhibit No.	Description
50	Hearing Examiner's Final Decision on Reconsideration (4-24-13);
51	Appeal from Final Decision Upon Reconsideration (5-8-13);
52	Letter from Alvin Rutledge (5-28-13);
53	Letter from David Thorpe (5-30-13);
54	Response from Applicants Hillman (6-7-13);
55	Memo from Lighthouse Law Group (6-7-13);
56	Reply Brief of Appellants (6-12-13); and
57	Sur-rebuttal of Applicants to Appellants' Reply Brief (6-14-13).

E. *General Jurisdiction of the City Council.* "An appeal must be filed within 14 days after the issuance of the hearing body's decision.[2] The appeal filed by Stephen Schroeder, Cheryl Beighle, Candy Brown and Todd Brown (hereinafter referred to as the "Appellants") was received by the City on May 8, 2013, and so was timely filed.

F. *Notice.* Public Notice of the Council's Closed Record Appeal Hearing was published in the Herald on June 2, 2013.

G. *Staff Report.*[3] The facts presented by Senior Planner Kernen Lien at the Closed Record Hearing can be summarized as follows:

Subject address and zoning: 1139 Sierra Place, Edmonds, RS-12.

Proposal: To construct a single family residential home on a vacant lot. The house

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[1] The list of Exhibits begins on page 0008 of the administrative record.
[2] ECDC Section 20.07.004(B).

would have a building footprint of 2,174 square feet, which includes a 578 square foot garage and 1,596 square feet of living space on the first floor and 1,027 square feet of living space on the second floor.

Site limitations: The lot is .93 acres in size. A category 3 wetland is located across the middle portion of the property and the 50 foot buffer for the Category 3 wetland extends into the eastern portion of the property and encompasses the entire western portion of the site. A non-fish bearing perennial stream, Type Np, is located on the northern side of the western half of the site. The minimum required 50-foot stream buffer overlaps with the wetland buffer and covers much of the northern portion of the site. Additionally, an erosion hazard area is located on the eastern portion of the site.[4]

Applications submitted: Development of the site is impossible, given the above limitations, without some impact on the critical areas and/or critical area buffers. Therefore, the Hillmans have submitted applications for:

1. A **critical areas reasonable use variance** under ECDC 23.40.210(A)(2), based on the Hillman's allegation that application of the City's critical areas regulations to the property would deny all reasonable economic use of the property;[5]

2. A **setback variance** under Edmonds Community Development Code (EDCD) Section 20.85.010, to reduce the minimum required street setback in ECDC 16.20.030 in the RS-12 Zone from 25 feet to 12 feet for the placement of the residence and to 3 feet for a retaining wall; and

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[3] The Staff Report begins on page 0081 of the administrative record.
[4] All of these facts are displayed in a map prepared by Wetland Resources, located at page 189 of the administrative record.
[5] *See,* description in the Staff Report for the manner in which the proposed construction of the home will impact the critical areas on the property, pages 0088-0095.

3. A **setback variance** under EDCD Section 20.85.010, to reduce the minimum required western side yard setback in EDCD Section 16.20.030 in the RS Zone from 10 feet to 3 feet for placement of a retaining wall.

The variance applications are intertwined so all have been consolidated into a single development and are being reviewed under File No. PLN20120033.

G. *Appeal Issues.* The Appellants have identified the following appeal issues to be considered in this Closed Record Hearing:

1. Should the Hearing Examiner's Final Decision on Reconsideration conditionally approving all variances be reversed because he did not make the required findings that all of the criteria for approval of the street setback and side yard setback variances under ECDC 20.85.010(F) or the critical areas variance under ECDC 23.40.210(A)(2)(c) had been satisfied?[6]

2. Should the Hearing Examiner's Decision on Reconsideration conditionally approving the critical areas reasonable use exception be reversed because the Hillman's purchase of the property for a price that reflects the application of the City's critical areas regulations eliminates any argument that they have suffered a "taking" of their property as a result of those regulations?[7]

H. *Oral Argument by Appellants and Applicants.* A detailed and complete summary of the oral argument presented by Appellants and the response by the Applicants Hillman has been included in the Minutes of the Edmonds City Council Meetings dated June 18, 2013. The City Council hereby adopts the same by reference as if fully set forth herein.

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[6] Exhibit 51, p. 1.
[7] *Id.*, p. 3.

I. Chronology Pertinent to Appeal. Here is a chronology of the events relating to the Hillman's variance applications, up to the time of the Hillman's submission of the applications subject of this appeal:

Date	Description of Event.
5-28-03	The subject property was purchased by Darryl and Shari Lewis for $190,000.
8-7-03	The subject property was included in a Critical Areas Study by Wetland Resources. As a result of the Study, the wetland and stream boundaries and their buffers were delineated.
1-15-04	Darryl and Shari Lewis filed an application for a critical areas reasonable use variance and north property line setback variance. The Lewis family planned to construct a single family home on the property.
4-19-05	After the variances were approved, the City Council heard an appeal of the variances.
7-24-05	After a remand, the Hearing Examiner approved the variances. However, the Lewis house was never built.
4-2011	The Hillman Family Trust purchased the property for $75,000.00.
8-1-12	The Hillmans submit applications (starting on page 0101) for the critical areas reasonable use variance, the street setback variance and the side yard setback variance.

J. Applicable Code. The criteria for approval of the variances that are at issue in this appeal are shown in italics below.

1. Setback Variances. The setback variances are governed by chapter 20.85 of the Edmonds Community Development Code. The criteria for approval are:

> **20.85.010 Findings.** *No variance may be approved unless all of the findings in this section can be made.*
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> A. Special Circumstances. That, because of special circumstances relating to the property, the strict enforcement of the zoning ordinance would deprive the owner of use rights and privileges permitted to other properties in the vicinity

with the same zoning.

1. Special circumstances include the size, shape, topography, location or surroundings of the property, public necessity as of public structures and uses as set forth in ECDC 17.00.030 and environmental factors such as vegetation, streams, ponds and wildlife habitats;

2. Special circumstances should not be predicated upon any factor personal to the owner such as age or disability, extra expense which may be necessary to comply with the zoning ordinance, the ability to secure a scenic view, the ability to make more profitable use of property, nor any factor resulting from the action of the owner or any past owner of the same property;

B. Special Privilege. That the approval of the variance would not be a grant of special privilege to the property in comparison with the limitations upon other properties in the vicinity with the same zoning;

C. Comprehensive Plan. That the approval of the variance will be consistent with the comprehensive plan.

D. Zoning Ordinance. That the approval of the variance will be consistent with the purposes of the zoning ordinance and the zone district in which the property is located;

E. Not Detrimental. That the variance as approved or conditionally approved will not be significantly detrimental to the public health, safety and welfare or injurious to the property or improvements in the vicinity and same zone;

F. Minimum Variance. That the approved variance is the minimum necessary to allow the owner the rights enjoyed by other properties in the vicinity with the same zoning.

2. Reasonable Use Variance. The criteria for a reasonable use variance for a private development in ECDC 23.40.210 are:

The application of this title would deny all reasonable economic use (see the definition of 'reasonable economic use(s)' in ECDC 23.40.320) of the subject property. A reasonable use exception may be authorized as a variance only if an applicant demonstrates that:

a. The application of this title would deny all reasonable economic use of a property or subject parcel;

b. No other reasonable economic use of the property consistent with

the underlying zoning and the city comprehensive plan has less impact on the critical area;

c. *The proposed impact to the critical area is the minimum necessary to allow for reasonable economic use of the property;*

d. The inability of the applicant to derive reasonable economic use of the property is not the result of actions by the applicant after the effective date of the ordinance codified in this title or its predecessor;

e. The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site;

f. The proposal minimizes net loss of critical area functions and values consistent with the best available science; and

g. The proposal is consistent with other applicable regulations and standards.

K. *Hearing Examiner Final Decision on Reconsideration.* The Hearing Examiner conditionally approved the variances (including the reasonable use exception).[8] The following portions of his decision and the administrative record are relevant to this appeal and the Council's decision:

Page 0001: The Examiner found:

The conditions of approval require further staff investigation for authorization of the encroachment into the wetland itself. *There is insufficient evidence in the record to determine if the proposal has been designed to minimize wetland encroachments as required by the variance criteria*[9]. . . . Further information is needed to determine whether the direct encroachment of this proposal should or can be avoided.

Page 0013-14: The Examiner found:

The most challenging issue for this proposal is whether the request constitutes the minimum necessary to grant relief from the City's critical area regulations. It appears that encroachments into the wetland could be almost entirely avoided by

[8] *See,* page 0001 of the administrative record.
[9] Emphasis added.

limiting the building footprint to 1,600 square feet,[10] inclusive of garage space. The need to encroach into 1,790 square feet of Class III wetland is based upon the applicant's desire to have vaulted ceilings and a driveway that could be larger than necessary to serve the property. Almost [all] of the living space and the garage could be located within the footprint proposed outside of the wetland if the applicant fully built out the second story of the proposed home in lieu of vaulted ceilings.

Page 0014: The Examiner found:

If only a buffer encroachment were proposed, as opposed to encroachment into the wetland itself, the size of the proposed home would clearly be considered a minimum variance request given the larger sizes of surrounding homes. However, a significant complicating factor in this application is that it appears that the encroachment into the wetland itself could be avoided entirely if the home is redesigned to replace the vaulted ceiling space with additional living space. The only reasons for not fully using second floor living space presented by the applicant were that they have a preference for first floor living space as they grow older and they want to avoid a boxy appearance for their home. The author of the wetland report, Andrea Bachman, was not able to provide any reason why the home couldn't be redesigned to avoid encroachment into the wetland. *These are not sufficient reasons to justify an encroachment into wetlands.*[11]

Page 0016: In his finding with regard to the criterion in ECDC 20.85.010(F), the Examiner stated:

As discussed in FOF No. 3, the purpose of the variance is to maximize the distance of the proposal from the Category III wetland and so should be considered the minimum necessary to enjoy the same development rights as others in the vicinity with the same zoning. The size of the home, which is referenced in the staff report under the analysis of the criterion quoted above, is irrelevant since any reduction in building size would not result in any reduction of the setback encroachment. Any reduction in home size should be used to increase the separation from the wetland.

Page 0017-18: In his finding with regard to the criterion in ECDC 23.40.210(A)(2)(c), the Examiner found:

[T]here is an open question as to whether the home has been designed to minimize impacts to the on-site wetland. The conditions of approval require further staff investigation and redesign of the project to the extent necessary to

[10] As stated on page 0009, the applicant seeks to construct a house that is 2,623 square feet in size, with a footprint of 2,174 square feet.
[11] Emphasis added.

mitigate project impacts.[12] According to the testimony of Mr. Brown, the applicants had to pay $75,000 for their lot whereas other lots in the vicinity average approximately $500,000. Although Mr. Brown did not provide any hard data to substantiate his cost estimates, his assertions were undisputed by the applicants and it is fair to conclude that the purchase price of the applicant's property was substantially reduced as a result of the wetland and stream. As discussed in the Order on Reconsideration, investment backed expectations are one of the factors involved in assessing reasonable use. If the living space and garage is limited to the footprint identified in Condition No. 1 of this decision, the applicants would still have 2,600 square feet of living space. This would be 1,200 square feet less than the average living space available to other homes that the applicant identified in the vicinity, but given the significantly reduced land value this would still qualify as a reasonable use if there was an appreciable environmental benefit to not building in the wetland.

Page 0020: The Examiner approved all variances subject to conditions. Condition No. 1 requires the staff to consult with a qualified wetland biologist:

> to determine whether removing the proposed wetland encroachment would appreciably improve upon impacts to wetland functions. If there is any appreciable environmental benefit to avoiding the proposed wetland encroachment, the building footprint for the home, inclusive of the garage, will be limited to the squared building space (including the west bay window) depicted in Ex. 4, Sheet 2, excluding the garage area and the room appended to the north of the garage to the extent it encroaches into the wetland. The southeast wetland encroachment of this living space is authorized. The driveway shall be located outside the wetland. Retaining walls may be built into the wetland to the extent necessary to support the home and driveway. If the driveway cannot be built to City standards without encroaching more than a foot into the wetland, the applicants may build the home as proposed with the 1,790 square foot encroachment.

L. *Evidence in the Administrative Record.* Here are specific references to the administrative record relating to the issues in this appeal:

Page 0105-6: Here, the applicant states that the "proposed home is smaller than the smallest home of all the properties adjoining it as shown in the comparison in Table 3 in the WRI study.

Page 0106: Under No. 6, "Minimum Variance," the applicants state that "without this variance, the applicants would be denied construction of any reasonable home on the property."

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[12] Emphasis added.

Page 0107: Under ECDC Section 23.40.210(A)(2)(c)'s requirement for "minimum necessary impact," the applicants state:

> The applicant has carefully considered the house size and design in order to minimize critical area impacts. The total footprint and living space are the smallest of all of the adjoining properties. The research and design work clearly demonstrate that the proposed development is the minimum necessary to achieve a reasonable use economic use of the property.

Page 0108: Under ECDC Section 23.40.210(B)'s requirements, the applicants state:

> Due to the predominance of the site's critical areas, it is not possible to place a dwelling on the lot and provide access to it without a variance to the code requirements for wetland and stream buffers. The buffer/setback reductions requested herein are the minimum necessary to allow a modest-size house to be placed on the property in the only location where it makes sense to develop. The applicant is not proposing to build anything more than a reasonable single family home in keeping with what the neighboring properties have.

Page 0194: In their "Response to City of Edmonds' Request for Additional Information," the applicants state:

> 5. Regarding the size of the proposed house, the requirement of ECDC is that the proposal be 'for reasonable economic use of the property,' and that the 'proposed impact to the critical area is the minimum necessary to allow for' that reasonable use. Reasonable use for the RS-12 zone is one single-family home for each 12,000 square feet of lot area, with no more than a 35% lot cove range. The maximum allowed footprint for a 12,000 square foot lot would be 4200 square feet. There is no minimum requirement for area of a second floor. The previously approved variance for this property which expired in 2012 was for a house with a footprint of 4146 square feet. The current proposal is for 2174 square feet of footprint (plus 163 square feet of porches), which is considerably smaller.
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> As part of the research for designing the house for this project, the sizes and footprints of neighboring homes were tabulated and averaged to determine what should be considered reasonable for this street in this zone, with emphasis on the only 2 critical area variances that have been granted in recent history (the Hachler home at 1111 Sierra Place, and the Lewis Variance for 1139 Sierra Place, granted but expired). While county records do not show footprint amounts specifically, they do show ground floor and garage areas. The average ground floor plus garage area for homes in the immediate neighborhood is 2936 square feet, compared to 2174 square feet for the proposed house. The Hachler home's footprint is 2492 square feet (measured from a plan sketch in the city's file) and the Lewis proposal was for 4146 square feet; both granted through critical areas

variances. Although the code does not demand 'the smallest house one could possibly build' nor 'the smallest ground floor area possible' as requirements for development in a critical area site, the minimizing of critical area impacts has been a major consideration.

Applicant's Sur-rebuttal, Page 5: The applicant states:

While the code makes it fairly clear that, for reasonable use purposes, one should be able to build a single-family home on a conforming single-family lot, it is silent as to how one should determine whether the 'minimum necessary' impact prong has been satisfied. For example, there is no minimum or maximum square footage in the code to help staff or the hearing examiner decide when a footprint is small enough to be considered the 'minimum necessary.'

Neither code nor previous variance precedent requires a house footprint *smaller* than what we have proposed. It does not define nor require a *minimum single family residence or minimum house size,* nor *a minimum footprint* as suggested by the appellants . . . but rather requires that 'the approved variance is the minimum necessary to allow the owner the rights enjoyed by other properties in the vicinity with the same zoning. . .

The applicants suggested that if the Council were to decide not to affirm the Hearing Examiner's decision, it could strike Condition No. 1 of that decision, and modify it, as suggested by the applicants. (This appears on page 10 of the Sur-rebuttal.)

Applicants' Argument at the Closed Record Appeal: The Applicants did not point to any evidence in the record to contradict the Hearing Examiner's pertinent findings of fact.[13] Instead, they described the calculations they used to determine the size of their proposed home, contended that a previous variance on the same piece of property had been granted (but not utilized) by the City, and explained the reason for the size of the proposed driveway.

M. *Conclusions of Law.*

1. Burden of Proof. The appellant bears the burden to demonstrate that the decision is clearly erroneous, given the record. ECDC Section 20.07.005(C).

2. Standard of Review. The City Council "shall determine whether the

[13] That the applicants' "need to encroach into 1,790 square feet of Class III wetland is based upon the applicants' desire to have vaulted ceilings . . ." Or that "[a]lmost all of the living space and the garage could be located within the footprint proposed outside of the wetland if the applicant fully built out the second story of the proposed home in lieu of vaulted ceilings." And that the "author of the wetland report . . . was not able to provide any reason why the home couldn't be redesigned to avoid encroachment into the wetland." These findings appear on page 0014 of the administrative record.

decision made by the hearing body/officer is clearly erroneous given the evidence in the record."[14] The Council shall affirm, modify or reverse the decision of the Hearing Examiner.[15] A finding is "clearly erroneous . . . when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed."[16]

Because this is a closed record hearing, the Council cannot base its decision on evidence that is presented for the first time in the appeal. Therefore, if the Council decides to modify or reverse the decision of the Hearing Examiner, it must identify the portion of the record upon which such modification or reversal is based.

3. Standard of Adequacy for Hearing Examiner's Decision. "Findings of fact by an administrative agency are subject to the same requirements as are findings of fact drawn by a trial court."[17] As this standard is interpreted by the Washington courts:

> The purpose of findings of fact is to ensure that the decision maker 'has dealt fully and properly with all the issues in the case before he [or she] decides it and so that the parties involved' and the appellate court 'may be fully informed as to the bases of his [or her] decision when it is made. . . . Findings must be made on matters 'which establish the existence or nonexistence of determinative factual matters . . .' [18]

4. Variance Requirements.

a. All of the variance applications (street setback, side yard setback and the reasonable use exception variance) are inextricably intertwined,[19] and the proposed development cannot proceed without approval of all of the variances. Therefore, the Council's decision on the

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[14] ECDC Section 20.07.005(H).
[15] ECDC Section 20.07.005(H).
[16] *Phoenix Development, Inc. v. City of Woodinville,* 171 Wash.2d 820, 829, 256 P.3d 1150 (2011).
[17] *Weyerhaeuser v. Pierce County,* 124 Wash.2d 26, 35, 873 p.2d 498 (1994).
[18] *Weyerhaeuser,* 124 Wn.2d at 35-36.
[19] *See,* page 0082, No. 1 Staff Report.

reasonable use exception variance below eliminates the necessity to address the Appellants' first appeal issue.[20]

b. Pursuant to ECDC Section 23.40.210(A)(2), a reasonable use exception may be authorized as a variance only if an applicant demonstrates that all of the criteria in ECDC Section 23.40.210(A)(2)(a) through (f) have been satisfied. ECDC Section 23.40.210(A)(2)(c) requires that the "proposed impact to the critical area is the minimum necessary to allow for reasonable economic use of the property."

The Hearing Examiner determined that there was "insufficient evidence in the record" to determine whether this criterion had been satisfied.[21] He described the rationale for the applicant's proposal, but conceded that "these are not sufficient reasons to justify an encroachment into wetlands."[22]

In his approval, the Examiner imposed a condition of approval that required the City staff to consult with the applicant's wetland biologist and as to the wetland impacts, and to then evaluate the need to reduce the size of the building footprint. The Hearing Examiner cited to no code provision or other authority that allows this procedure, which delegates his authority on a final decision as to the applicant's satisfaction of a variance criterion to the City staff, and terminates with a decision (on the wetland impacts and size of building footprint in the wetlands) from which there is no appeal.

5. Reasonable Use and Takings. "Reasonable economic use" is defined, in pertinent part, in ECDC Section 23.40.320 as follows: "The minimum use to which a property owner is entitled under applicable state and federal constitutional provisions in order to avoid a

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[20] Identified here in Section G(1) on page 5.
[21] *See,* page 0001 of the administrative record.

taking and/or violation of substantive due process."

Here, the City has adopted critical areas regulations affecting property, and the Hillmans bear the burden of establishing that application of those regulations "destroys any fundamental attribute of ownership, including the right to possess, to exclude others or to make economically viable use of the property."[23] "[T]he party claiming a taking has the burden of showing governmental conduct that will constitute a taking is not justified as a valid exercise of the police power."[24] "Even though the Government may 'take' private land . . . it can justify its conduct as a proper exercise of its police power, if it shows that it is merely restricting, but not eliminating the use of such land."[25]

An owner claiming loss of the economically viable use of property must show that the challenged governmental regulation proximately caused the loss of all such use.[26] "Proximate cause means a cause with, in a direct sequence unbroken by any new independent cause, produces the injury complained of, and without which, such injury would not have happened."[27] In other words, the applicants' business decision to purchase a lot heavily encumbered by critical areas for $75,000, which is significantly lower than the amount paid by others for property in the area without critical areas, is the proximate cause of their loss, if any. The Washington courts have held that a purchaser cannot sue for a taking or injury relating to the property that occurred prior to his or her acquisition of title:

> Because the right to damages for an injury to property is a personal right belonging to the property owner, the right does not pass to a subsequent purchaser unless expressly conveyed. . . . Furthermore, the court has found that no taking

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[22] *See,* page 0014 of the administrative record.
[23] *Guimont v. Clark,* 121 Wash.2d 586, 605, 854 P.2d 1 (1993).
[24] *Burton v. Clark County,* 91 Wash. App. 505, 516, 958 P.2d 343 (1998).
[25] *Id.*
[26] *Guimont,* 121 Wash.2d at 604.
[27] *Ventures Northwest Ltd. Partnership v. State,* 81 Wash. App. 353, 364, 914 P.2d 1180 (1996).

> damages should be awarded to plaintiffs who acquired property for a price commensurate with its diminished value.[28]

The applicants may argue that a second "take" will occur if the City denies the reasonable use variance. They also believe that the City's previous approval of a critical areas variance for the same piece of property entitles them to approval of this variance. However, the Washington courts have held that "[i]f existing land regulations limit the permissible uses of the property at the time of acquisition, a purchaser usually cannot reasonably expect to use the land for prohibited purposes."[29] The Washington courts have also ruled that no one is entitled to approval of an application simply because other, similar, development applications were approved.[30]

The Hearing Examiner should have denied the applicants' variances because the applicant did not demonstrate that all of the criteria for approval of the critical areas variance had been satisfied. Specifically, the applicants failed to demonstrate that the "proposed impact to

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[28] *Hoover v. Pierce County,* 79 Wash. App. 427, 434, 903 P.2d 464 (1995).

[29] *Buechel v. State of Washington Department of Ecology,* 125 Wash.2d 196, 210, 884 P.2d 901 (1994). In *Buechel,* the property owner Buechel purchased a narrow waterfront lot 8,500 square feet in size, on Hood Canal, and zoned for residential use. The minimum lot size in the zone was 10,000 square feet. Buechel admitted that most of the lot was underwater and that the buildable lot area was less than 1,000 square feet. Buechel applied for a variance to allow construction of a 20 x 35 foot, 2-story home on the property. The decision to deny the variance was upheld because the administrative record demonstrated that water-dependent recreational use of the property was a "reasonable use," providing Buechel with some economic value. As stated by the *Buechel* court:

> To some extent the reasonable use of property depends on the expectations of the landowner at the time of purchase of the property. If existing land regulations limit the permissible uses of the property at the time of acquisition, a purchaser usually cannot reasonably expect to use the land for prohibited purposes. Although not necessarily determinative, courts may look to the zoning regulations in effect at the time of purchase as a factor to determine what is a reasonable use of the land. Presumably regulations on use are reflected in the price a purchaser pays for a piece of property. This landowner knew when he purchased this lot that it did not satisfy the minimum lot size or the setback requirements of the [Mason County Shoreline Master Program]..

[30] The Washington courts have held that each application must be independently reviewed by the decisionmakers to determine whether it satisfies the laws in effect at the time the application was filed, and no application is entitled to automatic approval because other, similar applications were approved. *CROP v. Chelan County,* 105 Wash. App. 753, 760, 21 P.3d 304 (2001).

the critical area is the minimum necessary to allow for reasonable economic use of the property," as required by ECDC Section 23.40.210(A)(2)(c). So that there is no confusion on this point, any subsequent application(s) for variances submitted by the applicants must address the central questions posed by this appeal -- if the applicant fully built out the second story of the proposed home, could all of the living space and the garage be located within a building footprint situated outside of the wetland?[31] In brief, can this home be redesigned to avoid encroachment into the wetland? Until these questions are answered, no critical areas reasonable use variance may be approved.

From the evidence in the administrative record, it appears that the applicants misinterpreted these criteria for the variance(s), and instead developed their own formula for "reasonable use." The applicants asserted that "reasonable use" entitles property owner to "one single family home for each 12,000 square feet of lot area"[32] and therefore concluded that for their property, the "maximum allowed footprint for a 12,000 square foot lot would be 4200 square feet."[33] Because the applicants' proposed house was for 2,174 square feet of building footprint, they erroneously believed that the application should be approved regardless of whether it was the "minimum necessary to provide the applicant" with a "reasonable use" of their property.

Based on the above, the City Council concludes that the Hearing Examiner's failure to make findings on all of the criteria necessary for approval of the critical areas reasonable use variance is clearly erroneous. Because the City's code specifically provides that *all* criteria must be satisfied before a variance may be approved, he clearly erred in determining that the variance

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[31] Administrative record, page 0013-14.
[32] Administrative record, page 0194.

could be approved with a condition that would delegate the responsibility for ascertaining compliance with the code criteria to the City staff. Implementation of this process could have at least two deleterious effects. First, it would result in a decision by staff on the application that would be binding on all interested parties, without their consent or participation. Second, it would arguably create a precedent for future action. In other words, if the City allows variances to be granted without making a finding that all criteria for approval have been satisfied, then at some point in the future, another applicant will make the argument that his/her application should benefit from the same deficient treatment.

The City Council notes that its decision to reverse the Hearing Examiner's Decision on Reconsideration does not preclude the applicants from submitting future variance applications to build a house on the subject property.[34] Nor does the Council believe that denial of these applications constitute a take or an argument that the applicants' constitutional rights have been violated.[35]

DECISION

The City Council reverses the Hearing Examiner's Decision on Reconsideration on the critical areas reasonable use variance without prejudice. The critical areas reasonable use variance is denied.

DATED this 10th day of July, 2013.

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[33] *Id.*

[34] However, the applicants should note that there are restrictions on the resubmittal of applications. "[A] second application may be considered if there is a substantial change in circumstances or conditions relevant to the application or a substantial change in the application itself." *West Coast, Inc. v. Snohomish County,* 104 Wash. App. 735, 742, 16 P.3d 30 (2000).

APPROVED:

MAYOR, DAVID O. EARLING

ATTEST/AUTHENTICATED:

CITY CLERK, SANDRA S. CHASE

FILED WITH THE CITY CLERK: 06-28-2013
PASSED BY THE CITY COUNCIL: 07-02-2013
RESOLUTION NO. 1294

Compliance with RCW 36.70B.130. Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.

Appeals. This decision may be appealed to superior court according to chapter 36.70C RCW, within the deadlines set forth in RCW 36.70C.040.

[35] "The mere denial of a permit for one particular us does not establish the absence of any economically viable use." *Ventures Northwest,* 81 Wash. App. at 366.